



**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CR-3306-2024 (O&M)
Date of Decision: -**02.08.2024**

Parveen Kumar

... Petitioner

Versus

Harinder Singh and Another

... Respondents

-.-

CORAM: HON'BLE MRS. JUSTICE RITU TAGORE

Present:- Mr. Aditya Dassaur, Advocate
for the petitioner.

RITU TAGORE, J. (Oral)

1. The challenge in this petition, filed under Article 227 of the Constitution of India, is to the order dated 19.12.2023 (Annexure P-8), whereby application under Order 9 Rule 13 read with Section 151 of Code of Civil Procedure, 1908 (in short 'CPC') filed by the petitioner for setting aside *ex-parte* judgment and decree dated 02.02.2019 (Annexure P-2) has been dismissed and order dated 16.05.2024 (Annexure P-11) whereby the appeal filed by the petitioner, has also been dismissed.

2. Learned counsel for the petitioner contends that respondent No.1 instituted a Civil Suit for Specific Performance of Agreement to Sell dated 15.06.2016, titled as 'Harinder Singh vs. Parveen Kumar', against the petitioner, asserting that, pursuant to said agreement to sell, the petitioner had agreed to sell his residential house, as detailed in the plaint (Annexure P-1) but



subsequently refused to execute the sale deed, thereby breaching the agreement to sell. It is stated that the suit was decreed *ex-parte* against the petitioner vide judgment and decree dated 02.02.2019 (Annexure P-2). It is further submitted that perusal of record reveals that the petitioner was never served in accordance with law and was erroneously proceeded *ex-parte*, based on the presumption of service through registered cover after a thirty day waiting period without its return.

3. Learned counsel further submits that it was only on 15.11.2019 when the Bailiff along with respondent No.1 arrived at petitioner's property with a warrant of possession, petitioner became aware of the judgment and decree passed against him. Thereafter, the petitioner obtained the relevant documents pertaining to the judgment and decree dated 02.02.2019, and filed an application under Order 9 Rule 13 CPC read with Section 151 of CPC (Annexure P-4) to set aside the judgment and decree and *ex-parte* proceedings against him. The counsel submits that respondent contested this application by filing reply (Annexure P-5). Both the parties led evidence on the application, and learned trial Court vide order dated 19.12.2023 (Annexure P-8), erroneously dismissed the application on the ground of being barred by the law of limitation. Learned counsel further submits that learned Appellant Court also dismissed the appeal (Annexure P-9) filed by the petitioner vide order dated 16.05.2024 (Annexure P-11), without duly appreciating the facts and evidence on record, relying instead on surmises and conjectures.

4. Learned counsel further submits that petitioner was primarily non-suited on the ground of limitation due to the selective consideration of the petitioner's statement, wherein he acknowledged becoming



aware of the judgment and decree passed against him on 15.09.2019. The learned counsel contends that the learned trial Court erred by evaluating this portion of the petitioner's testimony in isolation and not in conjunction with his entire statement, wherein he explicitly testified that he became aware of the judgment and decree on 15.11.2019 and filed the application on 16.11.2019. The learned counsel asserts that it is well established principle of law that entire testimonial account of a person is required to be considered and not a part of it. He further submits that learned trial Court erred in assuming that the petitioner obtained the copy of judgment and decree on 04.02.2019, while conveniently overlooking the petitioner's application (Annexure P-10) which categorically states that said copy was applied for by the respondent.

5. It is contended by learned counsel that the learned Courts below erred in failing to ascertain whether petitioner was duly served in accordance with law, whereas the onus was upon the respondent to establish that petitioner was duly served in the suit (Annexure P-1). However, the respondent failed to examine the Process Server to prove the summons report that petitioner was served through his wife, who allegedly refused to accept summons on the behalf of petitioner. The Postal Peon was also not examined to verify that a registered letter was sent on the petitioner's postal address. In support of his arguments, learned counsel for the petitioner referred to the judicial pronouncements namely **G.P. Srivastava vs. R.K. Raizada and Ors, 2000(2) RCR (Civil) 161; Pawan Kumar vs. Rajinder Kumar and Another 2018(3) PLR 178; Prabhwati Devi and Another vs Gurdish Singh, 2018(1) Law Herald 526; Surinderjit Singh vs. Pritpal Singh,**



2020(3) RCR (Civil) 738; Doodh Singh vs. Mangilal, 2013 (23) RCR (Civil) 947 and Shambhu Prasad vs. M/s Satyam Rolar Flour Mills Pvt. Ltd, 2003(1) B.L.Jud. 302. Concluding his submission, learned counsel emphasizes on the settled legal principles of law that the Courts should adopt liberal approach and permit the parties to contest their matters on merits, than to dismiss their claims on technical grounds, particularly when the opposing party can be compensated by costs. It is stated that, given the facts, the orders are indefeasible in the eyes of law and should be set aside.

6. On other other hand, learned counsel for the respondents has defended the order, asserting that same was validly passed, based on a sound appreciation of evidence. It is stated that learned Courts below rightly relied on the petitioner's unequivocal admission of being aware of the judgment and decree on 15.09.2019. Further, the petitioner provided no explanation for the delay in filing the application to set aside the judgment and decree. The learned counsel submits that the petitioner is also *ex-parte* in execution petition, this conduct of the petitioner goes a long way to demonstrate that he is intentionally harassing the respondents, after having received ₹10,00,000/- as earnest money from the respondents under the agreement to sell.

7. The learned counsel submits that petitioner was duly served through registered letter sent at his last known correct address, which the petitioner does not dispute. Additionally, he was even served through his wife Vandana, who refused to accept the summons on his behalf. The petitioner does not deny that his wife's name is Vandana, thereby corroborating the summons report indicating that petitioner's wife refused to accept summons on his behalf.



8. The learned counsel argues that the learned Courts below, based on the evidence presented, have correctly concluded that petitioner was duly served in the suit and knowingly chose not to contest it. The petitioner was aware of the *ex-parte* judgment and decree (Annexure P-2) passed against him and failed to file an application within the prescribed period of limitation. Furthermore, the petitioner failed to establish any sufficient cause for his non appearance in the Court or for the delay in filing the application to set aside the *ex-parte* judgment and decree. It is submitted by the learned counsel that petitioner does not deserve any sympathy or leniency and a prayer is made for the dismissal of the petition.

9. I have heard learned counsel for the parties and have gone through the record with their valuable assistance.

10. It is a matter of record that respondent No.1 filed a suit for specific performance against the petitioner, resulting in passing an *ex-parte* judgment and decree dated 02.02.2019 (Annexure P-2) against the petitioner. The petitioner subsequently, filed an application under Order 9 Rule 13 read with Section 151 CPC (Annexure P-4) seeking to set aside the aforementioned judgment and decree, pleading that he was never served by any mode of service. The Process Server's reports and other related reports were fraudulently obtained against him. He came to know of the judgment and decree on 15.11.2019, when the Bailiff along with plaintiff came upon his property and threatened to dispossess him from the suit property.

11. As explicit from the record, the learned Trial Court framed issues, called the parties to present their evidence. Upon appraisal of the evidence, particularly noting the petitioner's admission of gaining the



knowledge of judgment and decree on 15.09.2019, the learned Courts below determined that, plaintiff filed the application under Order 9 Rule 13 read with Section 151 CPC (Annexure P-4) beyond the prescribed period of limitation and no application for condonation of delay was submitted, leading the learned Courts to dismiss the application of the petitioner

12. Insofar as the reliance on petitioner's admission of having gained knowledge of passing of *ex-parte* judgment and decree 02.02.2019 (Annexure P-2) on 15.09.2019 by the learned Courts below is concerned, it is my considered opinion that this is valid. The Courts below examined his entire testimonial account and concluded that his awareness of passing of the judgment and decree on 15.11.2019 was incorrect. Indeed, he became aware of the judgment and decree on 15.09.2019. A review of his complete statement reveals that the petitioner (PW-1) repeatedly referenced the incident of 15.09.2019, when the respondent and his companions came onto his property and allegedly attempted to dispossess him; he then came to know of the judgment and decree on 15.09.2019 passed against him. The learned Courts below relied on this unequivocal admission of the petitioner. It is well established principle in law that clear and unwithdrawn admissions can be relied upon. There is no evidence on record indicating that the petitioner moved an application before learned trial Court to explain the admission.

13. The settled position of law cannot be denied that the burden of proving the due service of opposite party, whether through ordinary summons or other permissible modes of service as envisaged under Order V CPC, rests upon the other party seeking the service. For that he must provide



positive and definite evidence to substantiate that the service was properly made upon the opposite party. In the present case, the respondent/plaintiff was required to prove due service of the petitioner/defendant in civil suit (Annexure P-1). The argument presented by learned counsel for the respondent/plaintiff that non-examination of petitioner's wife Vandana, is fatal to disprove the report of refusal by his wife, is untenable. The reason being, the petitioner is not required to lead evidence in negative.

14. Admittedly, the respondents did not examine the Process Server to prove the report of refusal made by the wife of the petitioner. However, this non-examination of Process Server is not fatal to the respondents, because the petitioner was not proceeded *ex-parte* on this report. The *zimni* order dated 09.03.2018 (Annexure P-3 Colly.) shows that petitioner was ordered to be summoned through RC&AD. *Zimni* order dated 16.03.2018, indicates that case was adjourned pending a report of registered cover service. The counsel placed postal receipts on 14.03.2018. The petitioner was again ordered to be summoned through ordinary as well as registered cover vide order dated 21.05.2018. On 10.07.2018, counsel placed postal receipt dated 31.05.2018 indicating that the petitioner was served through postal letter. When the registered cover (RC) was not returned within a 30-day period, the learned Trial Court drew a presumption of due and valid service upon the petitioner.

15. The petitioner has not disputed the addresses mentioned in the plaint or on the postal receipt, nor has claimed it as incorrect. Instead, he admitted in his deposition that the address is correct. Consequently, the learned trial Court appropriately inferred due service upon the petitioner, taking into account non-return of the registered cover (RC) at the address



provided. Section 27 of the General Clauses Act 1897 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered cover. The section provides that service by post shall be deemed to be effected by properly addressing, pre-paying and posting by registered cover, a letter containing a document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Section 114 of the Evidence Act 1872 provides that the Court may presume existence of certain facts, which it thinks likely to have happened regard being had to the common course of natural events, human conduct, and public and private business, in their relations to the facts of the particular case. The illustration given at serial No. (f) provides that Court may presume that the common course of business has been followed in particular case. Therefore, service through registered post is concerned, there is presumption that once a letter is dispatched at the correct address, it must have reached its destination. But this presumption is rebuttable. Here, the petitioner presented no evidence to counter the presumption, other than a mere denial of service through registered cover. Such a denial is insufficient, particularly, given the petitioner's admission of his postal address on the postal receipt as correct. The evidence, thus supports the conclusion drawn by the learned trial Court that the petitioner was duly served through recognized and permissible modes of service. Further, findings of the learned Appellate Court regarding unsatisfactory explanation for placing on record the certified copy of the judgment and decree (Annexure P-2) issued in favor of the respondent/plaintiff on 04.02.2019, appears justified, considering the petitioner's admission of



having gained the knowledge of the decree and judgment (Annexure P-2) on 15.09.2019. The learned Courts below have appropriately and accurately assessed the evidence and have not erred in proceeding against the petitioner *ex-parte*. Therefore, there is nothing on record, indicating that the conclusions and inferences drawn by learned Courts below, are contrary to the evidence or result from a misreading or misapplication of the evidence.

16. Now, arises the question, in these circumstances, where the petitioner has been found to be negligent and failed to provide a sufficient explanation for his non-appearance in the case and also could not explain the delay in filing the application within the statutory period of limitation, should he (owner of the suit property) be condemned unheard particularly when other party can be compensated with costs? Generally, the law favours adjudication of the matters on merits, by giving the litigating parties opportunity to present evidence and have their matters decided on their substantive merits. In **G.P.Srivastava vs. R.K. Raizada & Ors. 2000(2) RCR (Civil) 161** Hon'ble the Supreme Court held that *'even if the appellant was found to be negligent, the other side could have been compensated by costs and the ex-parte decree set aside on such other terms and conditions as were deemed proper by the Trial Court. On account of the unrealistic and technical approach adopted by the Courts, the litigation between the parties has unnecessarily been prolonged for about 17 years. The ends of justice can be met only if the appellant-defendant. is allowed opportunity to prove his case within a reasonable time'*.

17. Keeping in mind the observations made in **G.P.Srivastava** (supra) and settled exposition of law filtered through judicial precedents that



rival claims of the parties be settled on merits, this Court finds that to provide complete justice to the parties, the petitioner be given an opportunity to contest the matter on merits. Further to balance the equities between the parties, the petitioner should be burdened with costs. Accordingly, the petition is allowed and impugned orders dated 19.12.2023 (Annexure P-8), order dated 16.05.2024 (Annexure P-11) and order dated 02.02.2019 (Annexure P-2) are set aside, subject to payment of costs of ₹50,000/- to be paid by the petitioner, Parveen Kumar to the respondent No.1-Harinder Singh. On payment of costs, suit shall be restored at its original number and the parties shall appear before the learned trial Court within 15 days from obtaining the certified copy this order. The learned Court shall proceed with the case, as per law.

18. This Court is conscious of the fact that matter is of year 2018, the learned trial Court is directed to conclude the trial within one year by providing three effective opportunities to each party. Needless to mention, the concerned parties shall cooperate with the learned Court in deciding the matter expeditiously, without seeking any undue adjournment(s).

19. Since the main case has been decided, pending miscellaneous application(s), if any, are also disposed of accordingly.

02.08.2024
Gaurav Sorot

(RITU TAGORE)
JUDGE

Whether reasoned / speaking? Yes / No

Whether reportable? Yes / No